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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 196

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vito Genovese prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F. 2d 186, and is reported in part at 31 U. S. LAW WK. 2470. Appendix A to this petition prints the opinion as promulgated (App. 1a-11a) and the subsequent modifications (App. 13a, 14a). The opinions

of the district court are reported at 197 F. Supp. 536 (per Judge Bicks) and at 200 F. Supp. 711 (per Judge Murphy).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1963 (App. 12a). Rehearing and rehearing *in banc* were denied on April 10, 1963 (App. 15a). The time for filing of this petition was extended until June 8, 1963, by order of Associate Justice Harlan, entered on April 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the "clearly erroneous" standard, rather than review *de novo*, is applicable to review of district court *in camera* determinations of the producibility of statements under sub-section (e)(2) of the Jencks Act, 18 U.S.C. § 3500(e)(2).

2. Whether interview notes which are not entirely in the witness' own words but are found by the district court to "set forth in substance what the witness said", qualify as a "substantially verbatim recital" within the meaning of the Jencks Act, 18 U.S.C. § 3500 (e)(2).

3. Whether a government agent's deliberate omission from his interview notes of statements made during periods of the interview when the witness says nothing helpful to the government, or nothing relating to the subject matter of his direct examination, precludes all notes taken during the remainder of the interview from qualifying as "substantially verbatim" under 18 U.S.C. § 3500(e)(2).

4. Whether petitioner's due process or Jencks Act rights were violated by the government's unilateral

determination to withhold from the trial judge, after a proper defense request for Jencks materials, extensive interview notes taken by an Assistant United States Attorney, where such notes included statements which would have seriously impeached the testimony of the sole witness against petitioner and been producible under 18 U.S.C. § 3500(e)(2) as interpreted by the trial court.

5. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

6. Whether, if petitioner does not receive a new trial on the basis of asserted Jencks Act violations, the case should be remanded to the district court for reconsideration of the remaining grounds of petitioner's new trial motion in the light of additional evidence first made available to the defense after the motion's denial.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 16a-17a).

STATEMENT

The district court proceedings leading to the affirmance from which certiorari is here sought are summarized by the court of appeals as follows.

> "After a three months' jury trial in the Southern District of New York, appellants were con-

victed, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U.S.C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U.S. 974, 982, *rehearing denied,* 363 U.S. 858.

"On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500.

"After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon

> which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711." (App. 2a-3a).

Continuing the narrative of proceedings, on December 28, 1961, petitioner filed a notice of appeal from the order of Judge Murphy denying the motion for new trial (1798a-99a),[1] and the appeal was consolidated with that previously taken from the order of Judge Bicks (App. 3a).[2] On January 12, 1962, the government moved for reargument of the portion of Judge Murphy's decision holding that interview notes of Assistant United States Attorney Shaw dated October 10 and 11, 1957, "most assuredly should have been produced pursuant to § 3500" (1804a-16a). The motion included a prayer for leave to file an annexed affidavit of Shaw in support of the reargument motion (1804a). On January 17, 1962, the motion was denied in its entirety (1827a). No appeal was taken by the government either from Judge Murphy's decision of

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[1] The following method of citing record references is used herein:

Proceedings and exhibits on the motion for new trial are cited to petitioner's appendix in the court of appeals (vols. I through IV). These citations have the suffix "a" and no prefix. Proceedings on the original trial are cited to the appendix to this petitioner's brief on the appeal from conviction, which was rebound as a separate appendix volume to petitioner's brief on the instant appeal. These citations have the prefix "Tr." and the suffix "a". Unprinted portions of the proceedings on the original trial are cited to the typewritten transcript. These citations have the prefix "Tr." and no suffix. Certain trial exhibits are cited to the appendix to the petition for rehearing on the instant appeal. These citations have the prefix "R." and the suffix "a". Other record references are stated in full.

[2] To avoid any problem as to whether Judge Bicks' order had remained non-final until entry of Judge Murphy's, the December 28 notice of appeal included both orders (1798a).

December 22, 1961, which included an order that the government turn over to the defense copies of the October 10 and 11 interview notes (1796a, 200 F. Supp. at 718), or from the order of January 17, 1962, denying the motion for reargument and for leave to file the Shaw affidavit.

On the consolidated appeal, the court affirmed the denial of grounds one through six of the motion on the opinion of Judge Bicks below (App. 3a). The court's opinion was devoted solely to ground seven, which had been determined by Judge Murphy. The first four of the six questions presented in this petition relate to ground seven of the motion; the fifth relates to ground six. The sixth question relates to grounds one through five, but is included not to seek review in this Court of the merits of Judge Bicks' affirmed rulings on those grounds, but rather to preserve if necessary a claim for remand for further consideration of such grounds, in the light of the additional evidence first made available to the defense through the production of Shaw's notes subsequent to Judge Bicks' (and to Judge Murphy's) decision.[3]

Grounds six and seven of the motion for new trial both were predicated upon deprivation of government agents' notes of their interviews with the principal witness at trial, Nelson Silva Cantellops. These were notes which had not been before the trial court for its

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[3] Petitioner's detailed challenge to many of Judge Bicks' rulings on the first five grounds of the motion as unsupported by evidence or contrary to the weight of the evidence was rejected by the court of appeals (App. 3a). Since petitioner does not here seek further review of these rulings *made upon the record as it existed before Judge Bicks*, no summary of the voluminous testimony concerning these grounds of the motion is attempted herein. See pp. 43-44, *infra*.

determination of producibility under the Jencks Act. The notes referred to in ground six had been destroyed prior to trial; the notes referred to in ground seven had been in the government's possession at the time of trial. The notes referred to in ground six had been taken by narcotics agents Rowan, Consoli and Muglia. The latter two testified at the hearing on the new trial motion that they had destroyed the notes routinely (see 826a, 902a; 1361-63a, 1375-77a), and this testimony was accepted by the district court, see 197 F. Supp. at 557-58. Agent Rowan, by contrast, testified that he had destroyed his interview notes for the purpose of preventing their production under the Jencks rule (see 916a, 1137a, 1146a), but this testimony as to Rowan's purpose was not accepted by the district court, see 197 F. Supp. at 555. The notes referred to in ground seven had been taken by Assistant United States Attorney Shaw in the course of numerous interviews with the witness Cantellops conducted prior to the return of the indictment (see 1631a-34a; 197 F. Supp. at 558; 200 F. Supp. at 713, 715). It was undisputed that these notes had been in the government's possession at the time of trial but had not been furnished for the trial judge's inspection when he conducted an *in camera* examination of documents which might contain statements of the witness Cantellops producible under the Jencks Act. See 1770a, 1779a; 197 F. Supp. at 558; 200 F. Supp. at 714; App. 11a, n. 3, 13a.

Cantellops' Testimony Against Genovese

The witness Cantellops had been described by the court of appeals, in affirming the judgments of conviction, as "the principal government witness" to the conspiracy of which defendants were convicted. *United States* v. *Aviles*, 274 F. 2d 179, 182 (2d Cir.), *cert. de-*

nied, 362 U.S. 974, 982, *rehearing denied*, 363 U.S. 858 (1960).[4] In addition, as the trial court instructed the jury,

> "The witness Cantellops gave the only testimony concerning the defendant Vito Genovese." (Tr. 1101a.)[5]

In opposing review of the conviction by this Court, the government conceded that Cantellops' testimony was "not corroborated as to Genovese". Brief for the United States in Opposition to Certiorari, p. 28, *Genovese* v. *United States*, 362 U.S. 974 (1960), No. 817, Oct. T. 1959.

In his uncorroborated testimony against petitioner, Cantellops claimed to have seen Genovese on only four occasions:[6]

1) In the spring or early summer of 1956, on East Fourth Street, where Genovese was sitting in a car, talking to the defendant Carmine Polizzano (Tr. 340a).

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[4] The evidence at trial to establish the existence of the alleged "conspiracy to import, distribute, purchase and sell narcotics in violation of law" is summarized in the opinion affirming the convictions; it consists primarily of "testimony of the principal government witness, Nelson Silva Cantellops" as to his various trips from New York to deliver or pick up narcotics and as to activities in which he participated to plan and execute the distribution of narcotics locally in New York. See *United States* v. *Aviles*, *supra*, at 182-86.

[5] As to three other of the seventeen defendants on trial, namely Barcellona, Evola and Gigante, the instructions likewise stated that Cantellops had furnished the sole evidence (see Tr. 1081a, 1094a, 1099a).

[6] The testimony concerning Genovese consumed only some eight minutes on direct examination, and eleven minutes on cross-examination by counsel for Genovese, in the course of a three month trial (see Tr. 937a).

2) Later in the spring or early summer of 1956, on East Fourth Street, where Genovese was again talking to Carmine Polizzano (Tr. 340a-41a).

3) In early August of 1956, in a German restaurant on East 86th Street, where Genovese was talking to the defendant Ormento (Tr. 302a-03a).

4) At the end of August or the beginning of September 1956, when Genovese was present with Cantellops in a car proceeding up the West Side Highway to the defendant Mazzie's house in the Bronx, and during the latter part of a meeting in the basement of that house (Tr. 337a-42a, 350a-51a).

At the hearing on the new trial motion, Cantellops conceded that one of the foregoing occasions on which he allegedly saw Genovese did not occur. Cantellops' testimony did not make clear whether it was the first or the second occasion as to which he had been in error.

> "A. I saw him, all together in this transaction, three times, once in Fourth Street, once in the restaurant and again during the meeting.
>
> Q. Didn't you testify that you had seen him two times with Pollizzano? A. I never said so.
>
> * * *
>
> Q. So that your testimony now is whatever you said there you intended only to testify to one occasion when you saw Mr. Genovese with Mr. Pollizzano; is that right? A. Yes. I was testifying more or less the first time." (248a-49a).[7]

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[7] Although Cantellops claimed that he had not said at trial that he saw Genovese twice with Carmine Polizzano on Fourth Street (245a-48a), the trial testimony plainly contradicts this claim (see Tr. 338a, 340a-41a). On the appeal from conviction, the government stated that Cantellops had testified to two such meetings, in summarizing the evidence to this Court and to the court below. Brief for the United States in Opposition to Certiorari, p. 11, n. 8, *Genovese* v. *United States*, *supra*; Brief for Appellee, pp. 55-56, 107, *United States* v. *Aviles*, *supra*. The trial court's instructions likewise referred to two such meetings with Carmine Polizzano (Tr. A. 1101a).

Only on the fourth of the above-cited occasions did Cantellops claim to have heard what was said to or by or in the hearing of Genovese. The alleged conversation involving Genovese on that occasion, insofar as it concerned narcotics, dealt with plans for distribution of narcotics in New York; Cantellops mentioned no discussion as to the narcotics being imported (see Tr. 339a-40a, 350a-51a). Cantellops did not claim that Genovese or any other person present was in possession of narcotics on any of the four occasions. The jury, however, was not instructed that a defendant cannot be convicted of conspiracy to violate 21 U.S.C. §§ 173, 174, unless he had knowledge of importation of the narcotics which were the subject of the conspiracy or possession of narcotics from which such knowledge may be presumed (see Tr. 1059a-68a).[8] Indeed, the statutory presumption was not mentioned in the charge to the jury. Petitioner was therefore convicted solely upon uncorroborated accomplice testimony, which arguably included no evidence at all as to an essential element of the offense. It is against this backdrop that the district court and the court of appeals had to weigh the importance to this petitioner of the deprivation of any interview notes that might have impeached the witness Cantellops.

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[8] A similar omission from the instructions was held "plain error" by the court below in reversing convictions for conspiracy to violate 21 U.S.C. §§ 173, 174 in *United States* v. *Massiah*, 307 F. 2d 62, 70-71 (2d Cir. 1962). There,

> "[T]he court charged under the wrong statute (18 U.S.C. § 371) and in so doing omitted to charge, indeed rejected the idea, that the jury must find that the drugs were imported to the knowledge of each defendant in violation of law." *Id.* at 70.

The same error was committed in the instant case by charging "under the wrong statute (18 U.S.C. § 371)". See Tr. 1061a.

Rulings on Shaw's Interview Notes Below

The district court nevertheless held that petitioner was not prejudiced by the wrongful withholding of interview notes producible under § 3500. 200 F. Supp. at 714-18; see App. 5a-6a. As to one group of the withheld notes, comprising 61 pages (1853a-1913a), Judge Murphy held the deprivation non-prejudicial on the ground that, "we find that virtually the entire contents of [this group of] Shaw's notes correspond with the grand jury testimony of Cantellops which was turned over to the defense." 200 F. Supp. at 715; see App. 5a. Another group of interview notes, comprising 24 pages (1829a-52a), dated October 10 and 11, 1957, were found to contain impeaching material absent from the grand jury minutes, including "materially false versions of two of Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The basis for holding deprivation of these notes non-prejudicial was, apparently, that Cantellops was so thoroughly discredited that a showing of additional falsification "would simply add umber to an already blackened witness." As stated by the court of appeals:

> "Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby:
>
> ' * * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke

> untruthfully on yet another occasion * * * would simply add umber to an already blackened witness.' 200 F. Supp. at 717." (App. 5a-6a.)

The court of appeals expressly refrained from passing upon Judge Murphy's conclusion that the withholding of the Shaw notes was harmless error (see App. 6a). It should be observed, however, that neither in brief nor oral argument in the court of appeals did the government attempt to defend this conclusion. Its brief was silent upon the point.[9] When pressed on the point at oral argument, government counsel declined to support Judge Murphy's reasoning; he acknowledged that, if the government had "acted improperly" in withholding producible notes containing "something of any materiality", there would be prejudice. See court reporter's transcript of the oral argument (filed below and lodged in this Court) at pp. 120-22. On the other hand, as the opinion below notes, petitioner directed his "major attack" to the harmless error ruling (App. 6a)—for this was the only basis on which Judge Murphy had denied petitioner's new trial motion. With regard to Judge Murphy's finding that the group of 61 pages of notes "virtually . . . correspond" with the grand jury minutes, petitioner's brief noted, without being exhaustive, 61 material discrepancies between the notes and minutes. Brief on behalf of Defendant-Appellant Genovese, pp. 66-95. With respect to the 24 pages of October 10 and 11 notes, petitioner made a showing that these directly impeached 9 of the 27 episodes to which Cantellops had testified at trial, partially impeached 3 others, and indirectly impeached the remainder by a fatal discrepancy as to one episode's date. See *id.* at pp. 37-59. As already noted, petitioner's contentions in this regard were left undis-

[9] Copies of the briefs filed in the court of appeals by this petitioner and by the government have been lodged with the clerk of this Court.

puted and unanswered by the government in the court of appeals. Nor had Judge Murphy passed upon these contentions, since the notes were not disclosed to defendants until after Judge Murphy ruled.[10]

The court of appeals, while not passing upon the one issue decided by Judge Murphy in the government's favor, passed on the three other contentions which the government had urged below (App. 6a). It upheld Judge Murphy's rulings rejecting two of the government's contentions: that defendants had waived their right to object to the government's non-production of the Shaw notes at trial; and that statements to a government attorney are not within 18 U.S.C. § 3500 (e)(2) because an attorney is not an "agent of the Government" within the meaning of that subsection (App. 6a-8a). The government's third contention, that the notes contained no "substantially verbatim

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[10] In the decision of December 22, 1961, denying the motion for a new trial, Judge Murphy ordered that the October 10 and 11 notes be disclosed to the defense, and that the remainder be sealed. 200 F. Supp. at 718. After denial on January 17, 1962 of the government's motion for reargument with respect to the October notes (A. 1827a), those notes were first made available to the defense.

Petitioner thereafter moved the court of appeals for release of the remaining Shaw notes for use on the appeal. The court of appeals, by order of February 23, 1962, granted the motion "to the extent of such notes as Judge Murphy shall determine, either with or without a hearing in his discretion, to have been producible under the Jencks Act". Record of proceedings in the court of appeals (Vol. VIII of the record filed in this Court), p. 34. Acting pursuant to that order, Judge Murphy then directed by order of May 7, 1962, that 61 additional pages of the notes (1853a-1913a) be turned over, and the remaining 18 pages withheld. The 18 pages were held not producible under § 3500; with respect to the 61 pages, Judge Murphy held that any doubts should be resolved "in favor of disclosure at this juncture without the delay and expense that a hearing for that purpose would entail." See order of May 7, 1962, at pp. 9893-94 of the supplemental record on appeal, filed in this Court.

recital" of any statement by Cantellops, was upheld by the court of appeals, although it had been rejected by Judge Murphy (App. 9a-11a).

Judge Murphy applied to the notes "the same standard applied by the trial court, and that is, 'do they set forth in substance what the witness said.'" 200 F. Supp. at 715. Applying this standard,

> "[W]e find that the great majority of them are probably Jencks 'statements' and that a *voir dire* by the trial judge would have resulted in the government being ordered to turn them over to defense counsel." *Ibid.*

With respect to the notes other than those of October 10 and 11, the finding that they "would have" been held producible by the trial court was not further elaborated. With respect to the 24 pages of October 10 and 11 notes (1829a-52a), Judge Murphy further found that these "are in fact, substantially verbatim statements", and that they "most assuredly should have been produced" at trial.

> "These October, 1957, notes were therefore producible if they contained 'in substance what the witness said,' there being no question here but that they were in fact contemporaneously written by Shaw. From the beginning to the end of these particular notes they are written in the first person and they contain numerous quotes for responses or questions of third persons with whom Cantellops apparently narrates he was conversing. This, together with the very 'flavor' of the notes, and bearing in mind Shaw's testimony at the post-trial hearing, *inter alia*, as to the difficulty of taking a statement from Cantellops, constrains us to conclude (and no *voir dire* seems necessary for us to so find) that these notes would be found by the trial court to be, and are in fact, substantially verbatim statements, and of course, relevant to Cantellops' trial testimony on direct examination. The difficult issue here is that of prejudice, for

the notes most assuredly should have been produced pursuant to § 3500." 200 F. Supp. at 715-16.

The court of appeals declined to accept Judge Murphy's finding that the October 10 and 11 interview notes were "substantially verbatim statements" and that the great majority of Shaw's other interview notes were "probably Jencks 'statements' ". Instead, the Court redetermined *de novo* "this factual issue" (App. 9a). Expressly relying upon the Shaw affidavit which Judge Murphy had denied leave to file (see p. 5, *supra*), the appellate court concluded that none of Shaw's interview notes constituted "a substantially verbatim recital of an oral statement made by" the witness Cantellops to Shaw. For this reason the government's action in withholding the Shaw interview notes from the court at trial, although denounced by the court of appeals,[11] was held not to warrant a new trial. (App. 9a-11a.)

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[11] In its opinion promulgated on March 8, 1963, the court stated:

> "Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714." (App. 11a, n. 3.)

The second sentence of the foregoing was modified by direction of Judge Waterman on March 19, 1963:

> "On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof, 'See Judge Murphy's discussion, 200 F. Supp. at 714.' " (App. 13a.) The cited page of Judge Murphy's opinion held that even "doubtful" Jencks material should have been turned over to the trial court by the government, and that "Unilateral action on the part of the government in fairly doubtful instances cannot be condoned." Judge Murphy went on to find that the instant situation was not even "fairly doubtful" with respect to at least certain of the notes unilaterally withheld; the October 1957 notes "most assuredly should have been produced pursuant to § 3590." 200 F. Supp. at 716.

REASONS FOR GRANTING THE WRIT

The basic consideration for granting certiorari here rests upon what the Court did, and did not, decide in *Campbell* v. *United States*, No. 631, Oct. T. 1962 (May 27, 1963). (This decision is hereinafter cited as *Campbell*, with page references to the slip opinion; the previous decision in the same case, 365 U.S. 85 (1961), is cited as *Campbell* I.) In *Campbell*, as in the instant case, a district judge (other than the trial judge) found, in a post-trial proceeding, that material denied to the defense at trial was in fact producible under the Jencks Act, 18 U.S.C. § 3500. In both cases the district judge's determination of producibility was rejected by the court of appeals. In *Campbell* this Court reversed on the ground that the district judge's determination must be accepted unless "clearly erroneous". A similar disposition is warranted here, where the court of appeals avowedly made its own factual findings instead of limiting its review to determining whether the findings of the district judge were "clearly erroneous" (see App. 9a).

In *Campbell* this Court's ruling that the typewritten Interview Report was producible under § 3500(e)(1) rendered it unnecessary for the Court to reach the further questions, upon which certiorari had been granted, as to whether the typewritten report or the original interview notes were "substantially verbatim" statements within the meaning of § 3500(e)(2); and whether destruction of producible interview notes entails the imposition of sanctions under 18 U.S.C. § 3500 (d). See *Campbell* at 4, n. 5. The instant petition presents the questions as to the meaning of "substantially verbatim", and the effect of destruction of interview notes, left open by *Campbell*. The significance

to the government of the issues presented in *Campbell* has already been called to the Court's attention by the Solicitor General:

> "[T]he issues are of great importance to the government in the enforcement of federal criminal statutes." *Campbell*, Motion for Transfer of the Case from the Summary Calendar.

By the same token these issues are of great importance to determination of the rights of defendants in federal criminal prosecutions. This is further discussed under the enumerated reasons for granting the writ, which correspond to the numbers of the questions presented.

1. Certiorari should be granted, on the first of the questions presented, for the reason that a decision of this Court, subsequent to the decision below, has shown the court of appeals to have been in error. Such error consists in reviewing *de novo* the district court's determinations that documents were producible under § 3500 instead of applying the "clearly erroneous" standard of review to the trial court's rulings. In *Campbell* both the majority and dissenting opinions applied the "clearly erroneous" standard; the disagreement was as to whether on that record the district court's determination should be held "clearly erroneous".

The adoption of *de novo* review instead of the "clearly erroneous" standard cannot be justified by any valid distinction between the instant situation and *Campbell*. In *Campbell*, as here, the factual findings warranting producibility were made by a district judge other than the trial judge. The opinion in *Campbell* dealt with findings under § 3500(e)(1), while the findings here were under § 3500(e)(2). But no different standard of review is appropriate to determinations

of producibility under the two subsections. The rationale for upholding the district court finding under subsection (e)(1) in *Campbell* was taken from *Palermo* v. *United States*, 360 U.S. 343, 353 (1959), which had involved the determination of producibility under subsection (e)(2).

> "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts." 360 U.S. at 353 (footnote omitted); quoted in *Campbell* at 6.

As is apparent from *Campbell's* reliance on *Palermo*, the nature of the determination of producibility under subsection (e)(1) and (e)(2) is similar, combining strictly factual findings with an exercise of judgment peculiarly within the ken of a district judge, "subject to the appropriately limited review of appellate courts." A district court's determination under § 3500 (e)(2) of whether "the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent", *Palermo*, *supra*, at 352, is similar to the determination required of the district judge in *Campbell* under (e)(1): "whether Toomey's oral version of the notes may fairly be deemed a reading back of the notes to Staula; and whether the Interview Report may fairly be deemed a copy of the notes." *Campbell*, at 5.

The questions arising under subsections (e)(1) and (e)(2) are, petitioner submits, equally "ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous", *id.* at 5-6. The court below frankly recognized that determination

of whether the interview notes in this case were "statements" within the definition of § 3500(e)(2) was a "factual issue" upon which it chose to substitute its judgment for that of the district court.

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below."

"[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 [sic] (1959), it is 'the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement.'" (App. 9a.)

Nor should the applicable standard of review be dependent upon whether the district judge heard testimony from the interviewer, or the interviewee. Under the procedure prescribed by *Palermo, supra*, at 354-55, *in camera* determination of producibility not only is authorized; it will presumably encompass the majority of cases.

> "It is also the function of the trial judge to decide, in light of the circumstances of each case,

> what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others further information might be deemed relevant to assist the court's determination." *Id.* at 354-55.

The court of appeals here expressly approved the procedure followed by Judge Murphy in reaching his decision without a voir dire examination of the interviewer Shaw (App. 9a, n. 1, quoted *supra;* see also n. 10, *supra*). Since determinations of producibility under § 3500 are commonly made *in camera*, or on undisputed testimony, it would place a tremendous burden upon the appellate courts to require *de novo* review on appeal. Such a revolution in appellate procedure in federal criminal cases should not be sanctioned without this Court's consideration.

The rule of *de novo* review here adopted by the Second Circuit is in conflict with the holding of *Hance* v. *United States*, 299 F. 2d 389, 397 (8th Cir. 1962) that the "clearly erroneous" standard of review is applicable to *in camera* determinations as to producibility under the Jencks Act. The *Hance* holding was cited with approval by this Court in *Campbell*, at 6. The nascent conflict between the Second and Eighth Circuits created by the decision below has thus apparently been resolved by this Court. Petitioner should be entitled on certiorari to derive the benefit of that resolution.

The propriety of the *de novo* review accorded below is further called into question by the court's use of a dual standard. With respect to the notes which the district court had held within § 3500(e)(2), or probably so, the court of appeals made its own findings

(App. 9a). But with respect to materials found not "substantially verbatim" by the district court, the court of appeals affirmed on the ground that "We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous." (App. 4a-5a.) After the filing of a petition for rehearing taking exception to this use of a dual standard (Petition for Rehearing on behalf of Defendant-Appellant Genovese, p. 13), the court directed the deletion from its opinion of the word "clearly" before "erroneous". (App. 14a). Even then, however, the court did not purport to make a *de novo* determination with respect to these materials. The Second Circuit is not merely in conflict with the Eighth and with *Campbell*; it is in conflict with itself in the very same opinion.

A further disturbing aspect of the *de novo* review, petitioner submits, brings the case within the rule that certiorari is appropriate, "Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(b), Supreme Court Rules. Petitioner contends that such departure is involved in the appellate court's reliance (App. 10a-11a) upon an *ex parte* affidavit that was written after the decision from which petitioner had appealed. The affidavit by Shaw, dated January 10, 1962 (1816a), was submitted well after the district court's findings and opinion, rendered December 22, 1961, 200 F. Supp. 711 (1796a), and after petitioner's filing of a notice of appeal on December 28 from the decision of December 22 (1799a). The affidavit was tendered in support of the government's motion for reargument of the December 22 decision. However, under the district court's rules the affidavit could not even

be filed in support of such a motion without leave of court. Rule 9(m), General Rules of the United States District Court for the Southern District of New York. The government incorporated a motion for leave to file in its motion for reargument (1804a); but the motion was denied in its entirety (1827a). (Nor was an appeal from such denial taken by the government.)[12] Thus the court of appeals was reversing the district court's finding that Shaw's notes were "substantially verbatim" on the basis of *ex parte* evidence never adduced in the district court, and so of course immune from cross-examination. In *Lev* v. *United States*, 360 U.S. 470 (1959), similar reliance upon an interviewer's affidavit to *affirm* a district court finding of non-producibility was in issue before this Court under the limited grant of certiorari (question No. 5). But the disposition of *Lev* by an equally divided Court has left the issue unresolved.

2. The second of the questions presented here involves an issue raised but not resolved in *Campbell*: the proper definition of "substantially verbatim" as

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[12] The order denying leave to file was not interlocutory, since nothing remained to be decided by the district court. *Compare Andrews* v. *United States*, No. 491, Oct. T. 1962 (U.S., May 20, 1963). Arguably the ruling was appealable under 28 U.S.C. § 1291, which "applies to criminal actions, and to either party to the controversy including the Government", Note, 106 U. PA. L. REV. 612, 613, n. 6 (1958). Even in criminal cases § 1291 permits government appeals from decisions which "pertain to an independent peripheral matter", *Carroll* v. *United States*, 354 U.S. 390, 414 (1957).

Similarly, the government may have been entitled to appeal from the denial of its motion for reargument of the December 22 decision, or from the part of such decision on which reargument was sought. The government's failure to appeal raises a threshold question as to whether that part of the December 22 decision was subject to any appellate review, *de novo* or otherwise.

used in 18 U.S.C. § 3500(e)(2). (See question No. 2 in the *Campbell* Petition for Certiorari.) The question is one of widespread importance in the administration of federal criminal justice; it is potentially present in every prosecution where a government witness has been interviewed prior to trial and the interviewer has made notes. In addition, as pointed out in the *Campbell* Petition for Certiorari, p. 11, the interpretation of "substantially verbatim" has given rise to conflict among the circuits, calling for resolution by this Court.

As the *Campbell* petition noted, the restrictive interpretation of "substantially verbatim" by the First Circuit in *Campbell*, 296 F. 2d 527, 532 (1st Cir. 1961), 303 F. 2d 747, 748, (1st Cir. 1962), conflicted with the Second Circuit interpretations in *United States* v. *Thomas*, 282 F. 2d 191, 194 (2d Cir. 1960) and *United States* v. *McKeever*, 271 F. 2d 669, 674-75 (2d Cir. 1959),[13] with the Fifth Circuit interpretation in *Papworth* v. *United States*, 256 F. 2d 125, 129 (5th Cir.), *cert. denied*, 358 U.S. 854 (1958), and with the interpretation of a district court of the Third Circuit in *United States* v. *Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958).[14]

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[13] See also *United States* v. *Annunziato*, 293 F. 2d 373, 381 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Palermo*, 258 F. 2d 397, 399 (2d Cir. 1958) ("reasonably accurate or authenticated statements" are within § 3500(e)), *affirmed*, 360 U.S. 343 (1959).

[14] The First Circuit in *Campbell* contended that its interpretation of "substantially verbatim" was in accord with that of the District of Columbia Circuit in *Borges* v. *United States*, 270 F. 2d 332 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 971 (1960). *Campbell* v. *United States*, 296 F. 2d 527, 533 (1st Cir. 1961). However, the very brief opinion in *Borges* does not appear to bear this contention out. More recently the District of Columbia Circuit has cited with approval both the Second Circuit opinion in *United States* v. *McKeever*, *supra*, at 673-75, and the district court opinion in the

The conflict between the First and Second Circuit views was recently pointed out by the Court of Appeals for the Ninth Circuit in *Ogden* v. *United States*, 303 F. 2d 724, 735 n. 35 (9th Cir. 1962),[15] although the Ninth Circuit did not there find it necessary to reach a choice between the conflicting positions. The opinion below may appear to change the foregoing alignment, by interpreting "substantially verbatim" almost as narrowly as the First Circuit in *Campbell;* but the opinion did not purport to overrule, nor even cite, the prior Second Circuit decisions on point. The *Thomas* definition of a "substantially verbatim" statement as "a fairly comprehensive reproduction of the witness' words" thus, apparently, still stands in opposition to the First Circuit view in *Campbell.*

The basic conflict remains in any event between the narrow First Circuit interpretation in *Campbell, supra,* requiring stenographic completeness in longhand notes, and the Fifth Circuit view that longhand notes recording "the highlights of the conversation" qualify as "substantially verbatim", *Papworth, supra,* at 129. The government itself appears to have alter-

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instant case, *United States* v. *Aviles*, 200 F. Supp. 711, 715 (S.D.N.Y. 1961). *Saunders* v. *United States*, ... F. 2d .... (D.C. Cir. No. 17,122, Jan. 31, 1963), per Justice Reed, sitting by designation, slip op. at 6. The page of the *Aviles* opinion to which *Saunders* cites is the portion of Judge Murphy's opinion holding that interview notes taken by an Assistant United States Attorney were producible under 18 U.S.C. § 3500(e)(2) if they contained "in substance what the witness said".

[15] "As to the meaning of 'substantially verbatim' and 'contemporaneously,' compare the restrictive reading of *Campbell* v. *United States*, 296 F. 2d 527, 532 (1st Cir. 1961), with the more liberal construction of *United States* v. *Thomas*, 282 F. 2d 191, 194 (2d Cir. 1960), and *United States* v. *McKeever*, 271 F. 2d 669, 675 (2d Cir. 1959)." 303 F. 2d at 735, n. 35.

nated between these positions in this Court. While in *Campbell* it espoused the First Circuit position, in *Campbell* I it had cited as authority on the producibility of an agent's longhand notes: "See *United States* v. *Papworth*, 156 F. Supp. 842, 853-854 (N.D. Tex.), *affirmed*, 256 F. 2d 125 (C.A. 5), *certiorari denied*, 358 U.S. 854." Brief for the United States, p. 22, n. 9, *Campbell* I. The government thus appears to have approved the *Papworth* ruling, that the defendant was entitled to longhand notes of an F.B.I. agent, which concededly "were not 'word for word' recordings", where the "notes were made during the conversation [with the witness] and the F.B.I. agent specifically stated that the notes contained the *substance of the information* given to him by the witness." 156 F. Supp. at 853 (emphasis supplied).[16]

The instant record presents the "substantially verbatim" issue more sharply than the record before the Court in *Campbell*, since here the handwritten interview notes held not "substantially verbatim" by the court of appeals have been preserved and are reproduced in the record (1829a-1913a). In *Campbell*, on the other hand, the handwritten interview notes had been destroyed, and the question of their "substantially verbatim" character had to be determined merely from oral testimony based upon recollection some four years old. See *United States* v. *Campbell*, 199 F. Supp.

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[16] The *Papworth* criterion was further supported by the government in the same brief by the attempt to distinguish between an interview report of the witness Yates, produced at trial, and the interview report of the witness Staula. The distinction was warranted, according to the government, because "Yates testified that the report was *substantially correct* (R. 62), *thereby* qualifying it under subsection (e)(2), whereas Staula said that the report relating to him was not." Brief for the United States, p. 20, *Campbell* I (emphasis supplied).

905 (D. Mass. 1961). This is the first occasion of which petitioner is aware that extensive handwritten interview notes have been brought before this Court for determination of producibility under the Jencks Act. Yet it is such longhand interview notes which furnish the stuff of which the day to day problems under the Jencks Act are made. Typically, the typewritten reports whose "substantially verbatim" character must be determined under § 3500(e)(2) will derive from the agent's previous handwritten interview notes (and, almost as typically, the handwritten notes have been destroyed or are otherwise absent from the record). See, *e.g.*, *Campbell* and *Thomas*, *supra*; *McCarthy* v. *United States*, 301 F. 2d 796 (3d Cir. 1962); *Killian* v. *United States*, 368 U.S. 231 (1961). In addition, in many cases where no typewritten report has been made of a witness' interview, there will at least be handwritten interview notes taken by an Assistant United States Attorney or other agent of the government. For, as a Congress consisting largely of lawyers was well aware when it adopted the Jencks Act, a prosecuting attorney will ordinarily conduct interviews with prospective witnesses and make notes thereof. See 103 Cong. Rec. 15931 (85th Cong., 1st Sess., 1957).[17] Nor is it likely that all interview notes

[17] In the courts below the government vigorously contended that notes taken by an Assistant United States Attorney were excluded from the coverage of the Jencks Act. This question has been resolved against the government by both lower courts in the instant case (App. 8a, 200 F. Supp. at 715), as well as by the Court of Appeals for the District of Columbia Circuit in Justice Reed's recent opinion in *Saunders* v. *United States*, *supra*. The question is plainly one of great importance both to the government and defendants; the government presumably may seek to raise it, if certiorari should be granted, as a separate basis for sustaining the decision below.

taken by investigative agents are deemed worthy of transcription into typewritten form.

The extensive handwritten interview notes in the instant record (1829a-1913a) afford a sufficient basis for consideration by this Court of the standards which should govern producibility of longhand interview notes under the Jencks Act. The *Palermo* opinion, on which the court below relied, does not come to grips with the problem of interview notes, since a very different type of document was there involved. That document "was made from memory by one of the agents . . . . it was merely a summary of the agent's recollection of what had transpired at the meeting . . . . It does not appear that the memorandum was a transcript of notes taken during the interview . . . ." *United States* v. *Palermo*, 258 F. 2d 397, 399 (2d Cir. 1958); see Brief for the United States, p. 21, in *Palermo*, No. 471, Oct. T. 1958. In *Palermo* this Court held:

> ". . . that *summaries* of an oral statement which evidence substantial selection of material, or which were prepared after the interview *without the aid of complete notes*, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions." 360 U.S. at 352-53 (emphasis supplied).

The instant case, by contrast, confronts the Court with the "complete notes" taken by the agent during the interview. Such contemporaneous notes, unlike a post-interview report, do not "rest on the memory of the agent". The standards established by *Palermo* respecting summaries based on agents' post-interview recollection do not afford a ready formula for deter-

mining producibility of the agents' contemporaneously recorded interview notes.

Petitioner asks that this Court rule whether the "complete notes" of a government interviewer come within § 3500(e)(2) where, as here, they contain "in substance what the witness said". 200 F. Supp. at 715. The appropriate test, petitioner submits, should not exalt the form of the agent's recording over its substance; it should not depend upon adoption of the witness' grammar or particular phraseology. An agent for his own purposes will ordinarily record the substance of a witness' remarks. He ought not to be accorded an open invitation to insulate his recording from production to the defense by his testimony—ordinarily irrebuttable—that he rephrased the witness' words, or omitted portions not essential to the substance of what the witness said. Rather, where a law enforcement officer or prosecutor finds it adequate for his own use to record the substance of a witness' statement, such recording should likewise be deemed adequate for the use of the defense.

Any definition of "substantially verbatim" that makes its touchstone the wording rather than the substance of the recording will invite emasculation of § 3500(e)(2). An apt example is afforded by the testimony on a Jencks voir dire hearing in the recent trial of *United States* v. *Garfield*, 61 Cr. 671 (S.D.N.Y. 1962). A Justice Department attorney was there examined with respect to the producibility of interview notes which he had previously taken while serving as an Assistant United States Attorney for the Southern District of New York. The government attorney testified that his notes of interviews with the witness "do

reflect the substance of what he said . . . ." *Id.*, trial transcript at 2318. But professedly in order to "avoid . . . but not to evade" the Jencks Act, the attorney further testified, he would as a matter of policy refrain from using the exact words of the witness in taking his notes. *Id.* at 2374-75.[18] This manner of note-taking was attributed by the attorney to "my experience as an Assistant United States Attorney". *Id.* at 2375, 2383. He had admittedly developed the habit of rephrasing in his own words what the witness had said for the purpose of avoiding the Jencks statute. *Id.* at 2382-83.[19] The purpose was achieved, for the district

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[18] "Q. [by defense counsel, Mr. Berman] I believe you stated, and correct me if I am wrong, Mr. Shaffer—it has been some time since the last question—that it was not the policy to use the exact words of the witness you were interviewing. Is that correct?

A. Yes, that is correct.

Q. Then do I take it that it was the policy then to deliberately change the words that he used, so that the words would be your expression rather than his.

Mr. Walpin [prosecutor]: Objection.

The Court: I will permit Mr. Berman to question this witness as to whether there was any deliberate policy.

A. I would say it is not a deliberate policy, but it was a fact.

* * * *

Q. Are you saying that it was not a fact that it was deliberately designed for the purpose of not using the words of the witness?

A. I think that there was no deliberate design, but because of my experience as an Assistant United States Attorney and in interviewing people, it has always been my habit, because of the Jencks statute, to avoid it where possible but not to evade it."

[19] "Q. And that, basically, what you would do would be to write in your own words, just rephrase what it was he had told you or parts of what he had told you?

A. That is right.

Q. And that your purpose in doing this, if I understood you correctly, was to avoid the implications of the Jencks Act, so that

court concluded that the interview notes "were not substantially verbatim recordations of what the witness said." *Id.* at 2414.[20] The court added that, "the candid statement frankly uttered by the witness about his experience as an Assistant United States Attorney and his habit of note-taking does not indicate intent to subvert the Jencks Act." *Ibid.* Petitioner submits that, regardless of any government agent's subjective "intent to subvert the Jencks Act", such a result will in fact be accomplished if "substantially verbatim" is not defined to include notes which contain "in substance what the witness said".

Petitioner's position, that a competent interviewer's notes should ordinarily be producible in the form he records them, finds support in both the *Jencks* decision and the legislative history of § 3500. In *Jencks* v. *United States*, 353 U.S. 657, 668 (1957), the Court directed production of a witness' oral statements "as recorded by the F.B.I."—or as *Palermo* phrased it, "as recorded by agents of the Government." 360 U.S. at 345-46. In the Senate, subsection (e)(2) of the

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this would not be considered to be a statement in your opinion of what he had told you? Is that correct?

Mr. Walpin: Objection, your Honor.

The Court: Well, I will permit the witness to testify what his purpose was, if he had a purpose.

A. Well, as I testified before, the notes were taken according to the way I stated. As to whether I had a present intent at that point to avoid the Jencks statute, as you say, I cannot testify, but I can testify that because of my previous experience as an assistant I had come into the habit of note-taking with witnesses which was much this way and that I continued that note-taking.

Q. Didn't you use the words before that you did this to avoid, not evade, the Jencks statute?

A. Not this, but I developed the habit for that purpose."

[20] The example is unlikely to be an isolated one, since the interviews in question had been conducted under the personal supervision of a special assistant to the Attorney General (*id.* at 2436).

conference bill was explained to include recordings containing "not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and *as transcribed by him* . . . ." 103 Cong. Rec. 16488 (85th Cong., 1st Sess., 1957) (emphasis supplied); quoted in Appendix B to the opinion in *Palermo, supra*, at 359, and in Brief for the United States, p. 38, in *Campbell*.

In the instant case, by contrast, petitioner has been denied the contents of extensive interview notes as transcribed by Assistant United States Attorney Shaw. The result has been cited by Judge Clark of the court below as calling for corrective action by this Court.

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U.S.C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in . . . *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not sufficiently exact, though to the district judge 'probably verbatim,' recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U.S. 203, 258; *Palermo* v. *United States*, 360 U.S. 343, 346; *Jencks* v. *United States*, 353 U.S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from

the Supreme Court." *United States* v. *Cardillo*, No. 365, Sept. T. 1961 (2d Cir. April 24, 1963) (concurring opinion).

3. The instant case presents an important question, apparently left open by *Palermo*, as to whether the interviewer's omission of part of the interview renders his notes or report of the balance unproducible.

> "The summary in this case does not present the question whether the statute requires the production of a statement which records part of but not the entire interview between the witness and the government agent. This is a problem which also should be left to the development of the interpretive case law, and in fact I do not read the Court's opinion as essaying a definitive answer .... Since, as the Court's opinion concedes, statements made up from interviewer's notes are not *per se* unproducible, one would suppose that a summary, part of which gave a substantial verbatim account of part of the interview, would, as to that part, be producible under the statute." *Palermo, supra*, at 364-65 (concurring opinion) (footnote omitted).

Longhand interview notes, taken by a capable investigator or attorney, will ordinarily, like the notes in *Campbell*, be

> "... 'complete ... with respect to the pertinent information' given by [the witness], although not a complete word-for-word transcription of what he had said." *Campbell* at 2.

Whether notes of this character are to be producible under the Jencks Act—in the absence of the witness' signature or specific approval, such as was found in *Campbell*—is an issue of far-reaching consequence meriting consideration by this Court. The court below had previously left open a like question: whether a statement, to qualify as "substantially verbatim", "re-

quires not only correctness but a completeness that would include the immaterial and the trivial as well as the pertinent." *United States* v. *Annunziato*, 293 F. 2d 373, 381 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). The question apparently was answered in the instant case, by holding notes unproducible where the court found, from the interviewer's affidavit, that his notes "did not record the testimony that he thought was 'incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses.'" (App. 11a; see 1815a.)[21]

Petitioner submits that a statement's producibility should not be determined by a mathematical ratio between words recorded and time consumed by the interview. Omission of "the immaterial and the trivial" should not deprive the defendant of that which is material and significant. It may be doubted whether there is any interview devoid of all trivialities or immaterial pleasantries. Certainly there will be few such interviews if the interviewer knows that he can avoid production of his notes by the simple expedient of injecting a question about the weather or the interviewee's disposition. *Cf.* Note, *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 181 (1959) ("Seemingly, all an agent need do is selectively summarize the witness' remarks, or add to them some ideas of his

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[21] The court also found the notes selective on the ground that "They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops." (App. 11a.) But this is fallacious reasoning, for such a comparison proves nothing as to the completeness of the notes taken at any single interview. Since Shaw did not testify as to what was said or what notes were taken at any particular interview, the court could not possibly find that the 85 pages of notes (1829a-1913a) did not include complete transcriptions of certain of the 20 or 30 interviews, while recording others partially or not at all. Moreover, Shaw never testified that the notes which were produced included all the interview notes which he had taken (*cf.* 1779a).

own, and the resulting memorandum is effectively placed beyond production").

The paradox of allowing omission of irrelevant material to bar production of that which is relevant is heightened by the effect of 18 U.S.C. § 3500(c). By virtue of that subsection, any material recorded by the interviewer which does not relate to the witness' direct examination is to be excised from the interview notes before they are produced to the defense. Why then should the defense be deprived of the entire statement because irrelevant material, instead of being excised, was never recorded in the first place? At the least, petitioner contends, the qualification of a statement as "substantially verbatim" should not be affected by the interviewer's omission of material which would be excisable under § 3500(c). The instant record (including the Shaw affidavit) does not show that any material omitted by the interviewer Shaw did relate to Cantellops' direct testimony at trial. On the contrary, Shaw emphasized that his conversations with Cantellops often bore no relation to the subject matter of the case. "I would say that on every single occasion some time was spent in discussing matters completely extraneous to the case." (1632a.)[22]

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[22] "Q. But on each occasion you made notes? A. Yes—well, let me withdraw that. On some occasion no notes were taken because nothing was discussed.

Q. But I am talking about during interviews. You discussed the case didn't you? A. During the entire course of the interview?

Q. No, Mr. Shaw. When you had an interview with Mr. Cantellops, you discussed the case, did you not? A. Not necessarily.

Q. You did not. You discussed other matters? A. On many occasions we discussed other matters.

Q. Of the 30 occasions when you interviewed him, how many times did you discuss things other than the case? A. I would say that on every single occasion some time was spent in discussing matters completely extraneous to the case." (1632a.)

The object of *Palermo* was to prevent unfair impeachment. Since the material available for impeachment is the same whether the irrelevancies have been excised by the court under § 3500(c) or by the interviewer through his omissions, impeachment can be no less fair in the latter case than in the former.

> "Certainly a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation. The statute is to be given a reasonable construction, and the courts must not lose sight of the fact that the statute regulates *production* of material for possible use in cross-examination, and does not regulate *admissibility* into evidence—as the Court properly observes." *Palermo, supra,* at 365 (concurring opinion).

The result in the instant case is particularly difficult to square with the *Palermo* objective. For here the material assertedly omitted—statements which were incoherent, illogical, or demonstrably false—would obviously have increased the impeaching effect of the recording rather than rehabilitated the witness. It is quixotic to deprive petitioner of recorded material damaging to the witness' credibility because the Assistant United States Attorney determined not to record other material which would have been even more damaging.

4. Quite apart from the question whether the court of appeals applied § 3500(e)(2) correctly to the withheld Shaw notes, its decision should be reversed upon the authority of this Court's subsequent holding in

Brady v. *Maryland*, No. 490, Oct. T. 1962, 31 U. S. LAW WK. 4435, 4436 (May 13, 1963):

> "We now hold that *the suppression by the prosecution of evidence favorable to an accused upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> ". . . *A prosecution that withholds evidence on demand of an accused* which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." (Emphasis supplied.)

The court of appeals here held that the defense had properly requested under the Jencks Act the interview notes which the government unilaterally withheld from the trial court (App. 7a-8a). But, while concurring in the district court's "disapproval of the government's reprehensible actions" in withholding the notes (see n. 11, *supra*), the appellate court found that the notes did not contain any producible statements (App. 11a). The government may thus argue that the documents requested and withheld were not "material" within the meaning of *Brady*.

The test of materiality adopted in *Brady* was whether *the trial court* would have permitted the jury to consider the withheld document on the question of guilt. See 31 U. S. LAW WK. at 4437. Under that test reversal would be required here, for Judge Murphy expressly found that under "the same standard applied by the trial court" to the interview notes, "the great majority of them are probably Jencks 'statements' and that a *voir dire* by the trial judge *would have resulted in the government being ordered to turn them*

over to defense counsel." 200 F. Supp. at 715-16 (emphasis supplied). The appellate court, by contrast, made no finding on whether the notes would have been held producible at trial under "the same standard applied by the trial court". Instead it apparently assumed that, if the government had submitted Shaw's notes to the trial court, the latter would have reached the same conclusion on producibility as the court of appeals (see App. 11a). Yet the appellate court's own conclusion as to producibility was rested solely on the authority of the *Palermo* opinion, which had not even been rendered at the time this case was tried.

The correctness of Judge Murphy's conclusion that the trial court would have ordered production of Shaw's notes under § 3500, is readily apparent from the rulings at trial upon the producibility of those statements of Cantellops which the government did submit to the trial court.[23] *E.g.*, the trial court held "substantially verbatim" a paragraph of an agent's report as to which the testimony was as follows:

> "Q. [by the court] Now does paragraph 3 of this report constitute substantially a verbatim report of a conversation that you had with the witness Nelson Silva Cantellops?
>
> "A. [by agent Rowan] That, sir, is *a synopsis and it is in my own words.* It is a report to the Bureau. *It reflects what he told me on many occasions.* It was necessary to submit a status report

[23] The 14 excerpts from agent's reports which the trial judge ruled were "substantially verbatim" statements of the witness Cantellops are printed at pp. 1a-16a of the appendix to the petition for rehearing below. The trial court's voir dire examinations and rulings on the producibility of Cantellops' statements appear in the trial transcript at Tr. 2013-2058, 3159-3174.

in my own words." (Tr. 3167, emphasis supplied; see also Tr. 3173.)[24]

Another report of some 375 words (R. 9a-10a) was found "substantially verbatim", where the agent testified that he prepared it within a day of the interview but that during the interview he had made no notes except perhaps of several names and figures (Tr. 2021). According to government counsel below, at trial "the Court satisfied itself that any statements, in whatever form, provided the information emanated from Cantellops, was turned over to the defense" (888a).[25]

Thus, assuming *arguendo* the correctness of the present appellate ruling that Shaw's notes were not producible, it is clear that a ruling on the notes at trial would have been less favorable to the government. Impeaching statements in the Shaw notes would have been

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[24] The paragraph held "substantially verbatim" read:

"3. In addition to his dealings with RALPH POLIZZANO, JOHN DOE @ JUNIOR, now identified as SALVATORE MARINO, JACK RUSSO, ROSARIO COLLETTI, and other Italians operating out of the SQUEEZ-INN BAR, 87 E. 4th St.; previously reported, CANTELLOPS revealed that he has had dealings with other important Italian sources of supply JOSEPH DI PALERMO @ JOE BECK, IL #73A, CHARLES BARCELONA, CARMINE POLIZANO, JOHN ORMENTO @ BIG JOHN, IL #253, and a non-Italian, BENJAMIN LEVINE. A considerable number of his illegal activities with these individuals involve trips to Miami and Key West, Florida, for the purpose of bringing narcotics to New York City. Other trips were made to Las Vegas, Chicago and Cleveland, for the purpose of delivering narcotics. The period of time covered by these illegitimate activities goes from March, 1955, to July, 1957." (R. 15a.)

[25] Judge Bicks stated, in describing his trial rulings:

"... [T]he record demonstrates that the Court was exceedingly generous even to the point of going beyond the mere letter of the Jencks Act." 197 F. Supp. at 558.

produced to the defense but for the government's unilateral determination to withhold the notes from the trial court. The decision below permits the prosecution to profit from its own wrongdoing in withholding the requested statements, and is contrary to the doctrine of *Brady* v. *Maryland, supra.*

5. The fifth of the questions here presented again involves an issue raised but not reached in *Campbell:* the effect of an agent's destruction of his interview notes. In *Campbell* I this Court had left open the "important question" of whether all such destruction, or only bad faith destruction, calls for the sanctions authorized by 18 U.S.C. § 3500(d):

> "The parties argue whether destruction may be regarded as the equivalent of non-compliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of [the agent's] testimony." 365 U.S. at 98. See also *Campbell* at 2, n. 2 and 4, n. 5.

The instant record does afford the "opportunity to decide this important question of the construction of subsection (d)" which was not reached in *Campbell.* The Court here has the benefit of three different agents' testimony as to the circumstances of their destruction of interview notes; and this testimony presents both the good faith and bad faith situations. Narcotics agent Rowan has testified that he destroyed his notes in order "[t]o circumvent the Jencks deci-

sion" (916a, see also 1137a, 1146a). Agents Consoli and Muglia, on the other hand, have each testified that they destroyed their notes only because these were no longer needed for investigative purposes (see 826a, 902a; 1361a-63a, 1375a-77a).

Of the two alternatives left open by this Court in *Campbell* I, the lower courts in this case adopted that requiring bad faith destruction. 197 F. Supp. at 555-56; App. 3a (affirming on the opinion below). Petitioner urges that this Court consider adoption of the stricter of the *Campbell* alternatives, holding intentional destruction violative of Jencks Act rights regardless of the government's good faith. The recent decision in *Brady* v. *Maryland, supra,* suggests by analogy that good faith should not be the test employed. *Brady* held that the prosecution's suppression of requested evidence violates due process "irrespective of the good faith or bad faith of the prosecution." 31 U. S. LAW WK. at 4436. Destruction of notes potentially producible as evidence impeaching a prosecution witness, before such notes can be requested, is arguably a similar due process violation. An appropriate sanction to deter such destruction may, however, be provided without reaching the constitutional question by the statutory interpretation of § 3500(d) in accordance with the stricter alternative left open in *Campbell* I at 98, and in *Campbell* at 4, n. 5.

The routine destruction of agent Consoli's and agent Muglia's notes presents essentially the same situation before the Court in *Campbell.* The destruction of agent Rowan's notes raises the question whether § 3500(d) sanctions should be imposed where the agent has admitted that the destruction of his notes was for the purpose of preventing production under *Jencks.*

Petitioner submits that such a purpose should be held as a matter of law to entail "improper motives" or "bad faith". *Compare People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept. 1947), *affirmed*, 297 N.Y. 1000 (1948), holding that a police officer's destruction of his notes to avoid cross-examination entailed "bad faith" as a matter of law, despite the finding that the officer had acted in subjective good faith. Although the district court herein made adverse findings as to agent Rowan's credibility at the new trial hearing, 197 F. Supp. at 555-57,[26] the fact that he destroyed his notes remains uncontroverted. Former Assistant United States Attorney Shaw, whose testimony regarding Rowan was accepted by Judge Bicks, testified that his own file contained handwritten notes of Rowan, comprising approximately one-tenth as many pages as his own (see *id.* at 557; 1637a).[27] The

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[26] The appraisal of Rowan's credibility should be assessed in the light of the attitude manifested toward the witness in the court's very extensive intervention in his questioning (see especially 1203a-24a). *E.g.*, the court repeatedly asked Rowan whether his conduct had not been "foolish" or "foolishness" (see 1204a, 1205a, 1206a, 1220a, 1222a, 1223a, 1224a, 1228a, 1234a); the court invited Rowan to "unburden" himself of any "lies" in his testimony (1206a); the court suggested that Rowan might invoke the Fifth Amendment rather than admit improper conduct, and ordered stricken Rowan's response to the effect that he did not invoke the Amendment because he was not blameworthy (see 921a-23a). By contrast, the court at trial indicated no doubts as to Rowan's credibility and described him as a "very intelligent" witness (Tr. 3171).

[27] Shaw further testified that Rowan's notes were written on every line while Shaw's were written on every other line; and that he was not sure whether Rowan's notes, unlike his own, were written on both sides of the page (1641a). Thus the content of the Rowan notes in Shaw's file would be approximately one-fifth or two-fifths (depending upon whether Rowan wrote on both sides of the page) that of Shaw's notes, containing the equivalent of some 17 to 34 pages of the latter (1829a-1913a).

Rowan notes in Shaw's file have never been produced by the government, and must therefore be presumed destroyed. This accords with the unchallenged testimony of agent Rowan at the original trial, that "I had notes on a vast amount of information that he [Cantellops] had given me" but that such notes were no longer in existence (Tr. 3161, 3170; 197 F. Supp. at 554, n. 19a).

Thus at the least the record establishes that Rowan took a considerable volume of interview notes,[28] that such notes no longer exist, and that the agent's avowed explanation for their destruction was to circumvent *Jencks*. Even if the avowal of purpose be disregarded because of the district court's appraisal of Rowan's credibility, the record remains devoid of affirmative testimony that Rowan destroyed the notes in good faith. If the burden be upon the government to demonstrate good faith where potentially producible notes have been destroyed, that burden was not sustained in this case.

Petitioner submits that, if the Court should adopt the rule that good faith destruction entails no sanctions under § 3500(d), the Court should nevertheless hold that the burden of establishing such good faith rests upon the government. This would accord with the rule as to burden of proof stated in *Campbell* I, at 96. In resolving questions of good faith destruction under § 3500, the rule governing allocation of the

[28] The four excerpts ordered produced at trial from typewritten reports of agent Rowan (R. 13a-16a) are much too brief to comprise the entire contents of Rowan's many pages of notes. However, the production of these excerpts is significant in that it reflects a finding that Rowan was capable of recording Cantellops "substantially verbatim", thus leaving no basis for inferring that the notes which were destroyed contained no "substantially verbatim" statements.

burden of proof will be of critical significance, and should be determined by this Court.

6. Judge Bicks, in passing upon defendants' new trial motions, reserved decision "to the extent that these motions for a new trial are based upon the aforesaid papers of Assistant United States Attorney Shaw . . . ." 197 F. Supp. at 559. Insofar as the grounds passed upon by Judge Bicks were concerned, the court of appeals affirmed "the order below on the careful opinion of Judge Bicks" (App. 3a). The appellate court disregarded the possibility that Judge Bicks' decision on those grounds might have been altered by the subsequently produced Shaw notes, on whose significance he had reserved decision. Presumably it deemed its holding that the Shaw notes were not producible under § 3500 to bar their consideration upon the remaining grounds of the motion.

Question six is included in this petition so that, if Shaw's notes are held producible but it is not determined that their withholding prejudiced the defense at trial, the case may be remanded to the district court for consideration of the notes (and of evidentiary leads deriving therefrom) as further evidence on the first five grounds of the new trial motion. Petitioner submits that the notes contain significant information pertinent to such grounds which should be evaluated by the district court. *E.g.*, ground three of the motion was concerned with allegedly false testimony of Cantellops regarding his Las Vegas trip. Judge Bicks ruled that "The only demonstrably false trial testimony of Cantellops with respect to the Las Vegas trip" was insufficient to warrant a new trial. 197 F. Supp. at 548-49. But the subsequently disclosed Shaw notes "contained materially false versions of two of

Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The notes might accordingly be used to persuade the district court that Cantellops gave other false trial testimony regarding the Las Vegas trip.

Question six is included for the further reason that, even if the ruling stands that Shaw's notes were not producible under § 3500, petitioner contends that on remand the notes should be considered as evidence on other grounds of the new trial motion. *Cf. United States* v. *Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955), and *United States* v. *Miller*, 61 F. Supp. 919 (S.D.N.Y. 1945), both granting new trials partly on the basis of newly discovered pre-trial statements to the government contradicting the witness' trial testimony. Although *Palermo* held § 3500 exclusive as to production for purposes of impeachment at trial, this should not bar statements outside the statute from use as substantive evidence for defendants, especially on a post-trial motion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 66—October Term, 1962

(Argued December 18, 1962 Decided March 8, 1963)

Docket No. 27377

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, CHARLES BARCELLONA, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZI, CARMINE POLIZZANO, RALPH POLIZZANO and SALVATORE SANTORA, *Defendants-Appellants*.

Before:

WATERMAN, MOORE and MARSHALL, *Circuit Judges*.

Consolidated appeals from denials of appellants' motions for a new trial, United States District Court for the Southern District of New York, Bicks, *J.*, and Murphy, *J.*, pursuant to Rule 33, Fed. R. Crim. P. Affirmed.

VINCENT L. BRODERICK, United States Attorney, Southern District of New York (ARNOLD N. ENKER, ARTHUR I. ROSETT, RICHARD A. GIVENS, Asst. United States Attorneys, of counsel), *for appellee.*

ROY L. REARDON, New York City, *for appellant Barcellona.*

ALBERT J. KRIEGER, *for appellants Joseph Di Palermo, and Charles Di Palermo.*

MAURICE EDELBAUM, New York City, *for appellant Evola.*

EDWARD BENNETT WILLIAMS, Washington, D. C.; ROBERT L. WEINBERG, Washington, D. C.; WILFRED L. DAVIS, New York City, *for appellant Genovese.*

WILFRED L. DAVIS, New York City, *for appellant Gigante.*

HENRY K. CHAPMAN, New York City, *for appellants Nicholas Lessa and Rocco Mazzi.*

ALLEN S. STIM, New York City, *for appellant Ralph Polizzano.*

HERBERT S. SIEGAL, *for appellant Santora.*

WATERMAN, *Circuit Judge:*

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U. S. C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U. S. 974, 982, *rehearing denied*, 363 U. S. 858.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly

inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U. S. C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U. S. C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Govern-

ment's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the nonproduction of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain

of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U. S. C. § 3500 had then been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affiction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occa-

> sion * * * would simply add umber to an already blackened witness." 200 F. Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in *Rosenberg* v. *United States, supra,* and *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2 Cir. 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials, or to object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U. S. C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U. S. C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U. S. C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U. S. C. § 3500. In so arguing, the Government relies principally upon *Hickman* v. *Taylor*, 329 U. S. 495 (1947) and the public policy reflected therein. *Hickman* v. *Taylor*, however, was concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. *Saunders* v. *United States*, — F. 2d — (D. C. Cir. 1963) (No. 17,122).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U. S. C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made

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[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 (1959), it is "the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(2). The statement must fairly be "the witness' own words." *Palermo* v. *United States*, 360 U. S. 343, 352 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen differ-

[2] This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F. Supp. at 557.

ent sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, accordingly, affirmed.

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[3] Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714. In *Palermo v. United States*, 360 U.S. 343, 354 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

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Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Thurgood Marshall, *Circuit Judges.*

United States of America, *Plaintiff-Appellee,*

v.

Alfredo Aviles, et al., *Defendants,*

Charles Barcelona, et al., *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

A true copy,
A. Daniel Fusaro
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
P.O. Box 178
St. Johnsbury, Vermont

March 19, 1963

A. Daniel Fusaro, Clerk
U. S. Court of Appeals, 2 Cir.
U. S. Court House
Foley Square
New York 7, N. Y.

Dear Mr. Fusaro; In re: Docket No. 27377
U.S. v. *Aviles, et al*

Will you please make the following change in the above opinion:

> On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof: "See Judge Murphy's discussion, 200 F. Supp. at 714."

Thank you very much.

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

A true copy,
A. DANIEL FUSARO
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
U.S. Court House
New York 7, N.Y.

March 28, 1963

Memo to ADF

In re: Docket No. 27377
United States v. Aviles et al.

Dear Mr. Fusaro:

Will you please notify everyone who is entitled to be notified that the opinion in this case is modified by the deletion of the word "clearly" where it appears in the last line of subparagraph (1) on page 1347 of the slip sheets. Sentence will now read:

> "We cannot say that Judge Murphy's findings with respect to these materials were erroneous."

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

Copy to West Pub. Co.

A true copy,
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

v.

ALFREDO AVILES, ET AL., *Appellants.*

Denial of Petition for Rehearing

Edward Bennett Williams and Robert L. Weinberg, Washington, D. C. and Wilfred L. Davis, New York, N. Y., for appellant Vito Genovese.

Petition denied.

S. R. W.
L. P. M.
T. M.
U.S.C. JJ.

10 APR 1963

Denial of Petition for Rehearing In Banc

Edward Bennett Williams and Robert L. Weinberg, Washington, D. C. and Wilfred L. Davis, New York, N. Y., for appellant Vito Genovese.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

10 APR 1963

APPENDIX B

Text of the Jencks Act, 18 U.S.C. § 3500:

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event

the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.